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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RANDY TEJADA et al., Defendants and Appellants.	B215664 (Los Angeles County Super. Ct. No. PA058030)

APPEAL from judgments of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed as modified.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant Randy Tejada.

Jonathan P. Milberg, under appointment by the Court of Appeal, for Defendant and Appellant Damian Cantu.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants, Randy Tejada and Damian Cantu, appeal the judgments entered following their convictions, by jury trial, for assault by means likely to cause great bodily injury, battery with serious bodily injury, aggravated mayhem and simple mayhem, with gang, great bodily injury (Tejada only) and prior prison term enhancements (Pen. Code, §§ 245, 243, subd. (d), 205, 203, 186.22, subd. (b), 12022.7, 667.5),[1] They were sentenced to state prison for terms of 19 years to life (Cantu) and 18 years to life (Tejada).

The judgments are affirmed as modified.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

The victim, inmate Candelerio Martinez, was severely beaten inside Dorm 336 of the Pitchess Detention Center. Dorm 336 was a "Southsider" dorm which segregated members of numerous southern California Hispanic gangs from the general prison population. The evidence showed each dorm in the detention center had a "shot-caller," one of the inmates who enforced discipline within the dorm. This included the power to order the punishment of an inmate who had broken the rules. Punishments ranged from the mild, e.g., being forced to do calisthenics, to the severe. A severe punishment was called a "regulation," which could be moderately severe, e.g., a 13-second beating,[2] or extremely severe, e.g., an unrestrained assault resulting in death.

Inmate Valentino Lopez testified that when he moved into Dorm 336, he and the other new residents were taken aside and informed that defendant Cantu was the shot-caller. Cantu later personally confirmed to Lopez that he was the shot-caller for Dorm 336. Lopez testified that, during his time living in Dorm 336, he had watched

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] The beating lasts 13 thirteen seconds because "M" is the 13th letter of the alphabet and stands for the Mexican Mafia.

Cantu perform the functions of a shot-caller: "Basically, when things got out of hand in the dorm, if it was too loud or things need to be cleaned up, or basically if there was a problem, it was always discussed with him." An inmate named Boxer, who was second in command, issued instructions only when Cantu was away from the dorm.

Lopez testified the inmates had their own internal discipline system. For minor infractions a disciplined inmate might be ordered to do "burpees," a type of calisthenics. More serious offenses were punished by varying degrees of "regulation": "[I]f it's real bad, it's 13 seconds, three people beat you up for 13 seconds. [¶] . . . [I]t's not supposed to be face shots, it's supposed to be body shots. And then if it's full force, then it could be anything. It could be as far as him stabbing you to them beating you unconscious." Short of full force, the attacking inmates "are not supposed to stomp on you or kick you when you are on the floor. They are just basically body shots. But if you do something really bad, then they could just [use] full force, they could do whatever they want." A full force regulation had no time limit and sometimes involved the use of weapons.

According to Lopez, on September 4, 2006, one of the Dorm 336 inmates complained to Cantu that Martinez had stolen something from him. Cantu told Martinez to turn over his personal belongings so they could be checked for stolen items. Cantu spread Martinez's possessions on a table and looked through them. When Cantu discovered the missing items, Lopez knew Martinez "was going to be regulated." The penalty for theft was a "hard" or "full force" regulation. Lopez's friend Criminal told him Martinez was going to be regulated and that Lopez was expected to take part. Lopez had no doubt it was Cantu who ordered Martinez's regulation. Lopez participated because he feared he himself would be regulated if he refused.

A small crowd gathered around Martinez's bunk. Someone pushed Martinez to the ground and inmates took turns hitting and kicking him. Lopez punched and kicked Martinez a few times and walked away. Other inmates then kicked Martinez some more. Lopez testified Cantu did not participate in the beating "[b]ecause usually the shot-caller is not involved. He usually gets other people to do with work." Someone then dragged Martinez in between two bunks, where the inmates "continued to stomp on him."

Lopez tried to get them to stop because he thought Martinez was going to be killed. Martinez appeared to be unconscious; he was lying "flat on the floor" with "his head to the side."

Defendant Tejada then walked over to Martinez, stood on the edge of a bunk, and stomped on Martinez's head five or six times. Tejada's blows landed on Martinez's "left temple, . . . he just stomped on him." Tejada and Cantu then dragged Martinez back to his own bunk. Cantu poured water on Martinez and used a towel to wipe blood off of him. Martinez started to choke on the water and fell off the bunk. Cantu yelled "man down" to get the guard's attention. Lopez testified he subsequently heard Cantu say that Martinez was supposed to have been stabbed.

Los Angeles County Deputy Sheriff Patrina Smith was working as the "dorm deputy" in Dorm 336. Smith testified her job was to "maintain order in the dorm, preserve [the inmates'] safety and make sure they are fed. Just their regular daily things that they need to get done, I oversee it." Smith testified every dorm typically had a single leader, an inmate who acted as a liaison between the inmates and the dorm deputy. A deputy's orders would be relayed to the inmates by the leader, who ensured the orders were obeyed. Smith's training officer had told her Cantu was the leader of Dorm 336. Soon after Smith started working in Dorm 336, Cantu told her: "[I]f you need anything come to me, I'm the person to go to." Smith noticed that when Cantu spoke, the other inmates listened to him and followed his orders; this happened two or three times a day.

Smith testified that on September 4, 2006, she heard a big noise and then Cantu yelled "man down." When Smith saw Martinez facedown between two bunks, she called for backup. When the deputies got to Martinez, he was semi-conscious and moaning. He had clear liquid coming from his mouth, and he had defecated and urinated on himself. He was taken to the hospital.

Deputy Sheriff Peter Bommarito visited Martinez at the hospital emergency room about 30 minutes later and photographed his injuries. These photographs were admitted into evidence at trial. Medical reports from three doctors who treated Martinez in the hospital were also admitted into evidence.

There were surveillance cameras set into the ceiling of Dorm 336. Deputies used the videotapes from these cameras to identify the inmates who had been involved in Martinez's beating. When Deputy Dennis Salazar interviewed Tejada, he showed him video footage of an inmate putting on his shirt. Tejada acknowledged he was the person in the video, but said, "Yeah, so what. I'm putting my shirt on." When Salazar then showed footage of Tejada stomping on Martinez, Tejada said, "Fuck this. I didn't do anything."

Martinez's mother, Maria, testified her son was currently living in Mexico. Although she had not seen him since the assault, she had spoken with him six or seven times on the telephone. Maria testified that prior to the assault Martinez could speak clearly and did not have any mental problems. Since the assault, he had trouble speaking and problems with his memory.

If Maria mentioned his childhood friends, Martinez would say "Who are they?" In addition, he was slow to recognize her voice during their phone conversations. "[W]hen he calls, he . . . seems to be waiting for a while trying to recognize that it's me." Maria testified she would pick up the phone, "say 'Hello, hello,' and he would say, 'Is it you, Mom[?]' and then, we would talk." Right after the assault, Martinez "would try to talk and . . . you couldn't understand him. That is, he wasn't able to talk." However, Martinez's speech had improved since the assault and now she could understand him.

Deputy Tyrone Berry testified as a gang expert. "Southsiders" are Hispanic gang members from southern California. Southsiders' primary activities while in jail are drug trafficking, smuggling, extortion, violent assaults, rapes and murders. The violent crimes serve to intimidate the inmates and reinforce the gang's control over them.

Berry testified Southsider prison dorms had an established hierarchical structure. Every Southsider dorm had a shot-caller whose job was to oversee dorm life and relay official orders from the guards to the inmates. Inmates would refer disputes to the dorm shot-caller, who acted as a mediator. Although the inmates in Dorm 336 came from various southern California Hispanic gangs, they were all considered foot soldiers of the

Mexican Mafia, which required them to get along with each other while in custody. Inmates who violate gang rules in jail are subject to beatings.

Berry opined Cantu was the shot-caller for Dorm 336 and that he had ordered the assault on Martinez. As an example of Cantu acting as shot-caller, Berry described how, a week before Martinez's beating, Berry told Cantu he wanted some Southsider graffiti in the day room cleaned up. Cantu said, "I will take care of that," and summoned two inmate "volunteers" to do the work. In return, Cantu asked Berry to move a particular inmate into Dorm 336, which Berry agreed to do.

Shown footage from the surveillance videotapes, Berry testified he could see Cantu "giving instructions" to other inmates right before the assault, which included Cantu gesturing toward Martinez. In Berry's opinion, this showed Cantu "gave the okay to have that person attacked. And you can see the crowd or the mob. The assault is about to take place immediately after he gave the gesture. Immediately after." Berry opined the full force regulation administered to Martinez had been carried out for the benefit of the Southside gangs: "I base my opinion on this particular incident in that particular dormitory[. A] Southsider dorm[] breeds fear and intimidation for the remaining population. It keeps them disciplined. It keeps the[m] abiding by the rules. It shows the other inmates that this is what will happen to you, that or worse, if rules are not followed and commands are not obeyed."

The defendants did not put on any evidence.

CONTENTIONS

1. There was insufficient evidence to sustain the convictions for aggravated mayhem.

2. The convictions for simple mayhem and battery with serious bodily injury must be reversed because they are lesser included offenses of aggravated mayhem.

3. The trial court erred by denying Cantu's new trial motion based on newly discovered evidence.

DISCUSSION

1. *There was sufficient evidence of aggravated mayhem.*

Defendants contend their convictions for aggravated mayhem must be reversed because there was insufficient evidence to prove either that they acted with the requisite specific intent, or that Martinez was permanently disabled. This claim is meritless.

a. *Standard of review.*

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

" 'An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.' [Citation.] 'Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the

verdict of the [finder of fact].' [Citation.]" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. [Citation.] Thus, when a criminal defendant claims on appeal that his conviction was based on insufficient evidence of one or more of the elements of the crime of which he was convicted, we *must* begin with the presumption that the evidence of those elements *was* sufficient, and the defendant bears the burden of convincing us otherwise. To meet that burden, it is not enough for the defendant to simply contend, 'without a statement or analysis of the evidence, . . . that the evidence is insufficient to support the judgment[] of conviction.' [Citation.] Rather, he must *affirmatively demonstrate* that the evidence is insufficient." (*Ibid.*)

b. *The crime of mayhem.*

Simple mayhem is defined by section 203, which provides: "Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem."

Aggravated mayhem is defined by section 205, which provides: "A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body. For purposes of this section, it is not necessary to prove an intent to kill. Aggravated mayhem is a felony punishable by imprisonment in the state prison for life with the possibility of parole."

"Mayhem in early common law was committable only by infliction of an injury which substantially reduced the victim's formidability in combat. [Citations.] . . . [¶] The common law definition, however, was gradually expanded in consequence of a series of statutes, the most notable of which, the so-called Coventry Act, broadened the concept of mayhem to include mere disfigurement without an attendant reduction in fighting

ability. . . . [¶] The Coventry Act . . . did not displace the common law of mayhem, the gist of which was malicious maiming, but provided an increased penalty for intentional maiming and for the first time extended the crime to include mere disfigurement. [¶] Cases decided under the Coventry Act, and statutes like our own which obviously derive from it, have found mayhem for disfigurement alone only where the injury is permanent." (*Goodman v. Superior Court* (1978) 84 Cal.App.3d 621, 623-624, fn. omitted; see also *People v. Green* (1976) 59 Cal.App.3d 1, 3 ["what is important now is not the victim's capacity for attack or defense, but the integrity of his person"].)

c. *Sufficient evidence of specific intent.*

Defendants contend their aggravated mayhem convictions must be reversed because there was insufficient evidence they acted with the required specific intent. This claim is meritless.

"Aggravated mayhem is a specific intent crime which requires proof the defendant specifically intended to cause the maiming injury, i.e., the permanent disability or disfigurement. . . . [E]vidence of a 'controlled and directed' attack or an attack of 'focused or limited scope' may provide substantial evidence of such specific intent. [Citation.] However, where the evidence shows no more than an 'indiscriminate' or 'random' attack, or an 'explosion of violence' upon the victim, it is insufficient to prove a specific intent to maim. [Citation.]" (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162.) "Aggravated mayhem requires proof the defendant specifically intended to maim – to cause a permanent disability or disfigurement. [Citation.] A jury may not find specific intent 'solely from evidence that the injury inflicted actually constitutes mayhem; instead, there must be other facts and circumstances which support an inference of intent to maim rather than to attack indiscriminately.' [Citation.] 'A jury may infer a defendant's specific intent from the circumstances attending the act, the manner in which it is done, and the means used, among other factors.' [Citation.] '[E]vidence of a "controlled and directed" attack or an attack of "focused or limited scope" may provide substantial evidence of' a specific intent to maim. [Citation.]" (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 831.)

(1) *Application of rules to Tejada.*

Tejada argues there was insufficient evidence of specific intent as to him because Martinez was subjected to "an indiscriminate and random attack" during which he was punched and kicked by various inmates on all parts of his body. This argument fails, however, because even if Martinez had been initially subjected to an indiscriminate attack during which other inmates pummeled his entire body, the evidence showed Tejada's own attack was controlled and directed. It was *after* Martinez had already sustained the initial beating, and was lying on the floor apparently unconscious, that Tejada stood on the edge of a bunk and stomped directly onto Martinez's head six or seven times.

Hence, the evidence showed Tejada's attack was both planned and precisely focused on Martinez's head, and this provided sufficient circumstantial evidence of Tejada's specific intent to maim. (Compare *People v. Szadziewicz, supra,* 161 Cal.App.4th at p. 831 [evidence of "controlled and directed attack focused on [victim's] face and neck" with knife showed specific intent]; *People v. Quintero, supra,* 135 Cal.App.4th at p. 1163 [that defendant focused knife attack on victim's head and then stopped "once he had severely maimed [victim's] face" showed specific intent]; *People v. Park* (2003) 112 Cal.App.4th 61, 69-70 [specific intent shown where defendant aimed steel knife-sharpener directly at victim's head and ceased attack after successfully maiming victim] with *People v. Anderson* (1965) 63 Cal.2d 351, 356 [insufficient evidence of specific intent for felony-murder purposes where victim sustained 41 knife wounds over entire body, many of which were post mortem]; *People v. Sears* (1965) 62 Cal.2d 737, 745, disapproved on another ground in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17 [insufficient evidence of specific intent where victim tried to stop defendant from attacking her mother and was hit in head several times with steel pipe]; *People v. Lee* (1990) 220 Cal.App.3d 320, 327 [insufficient evidence of specific intent where no known motive for brief attack in which victim was punched in head and kicked elsewhere].)

Tejada asserts the evidence showed he "acted at the behest of another. If [the prosecution witnesses'] testimony is credited, he did not attack Martinez from any personal animus, but rather as a foot soldier executing an order to administer a punishment." But Tejada's lack of personal animosity does not negate the circumstantial evidence showing he specifically intended to maim Martinez. After all, even hired assassins can be guilty of premeditated first degree murder.

Tejada argues, "There is nothing in the evidence . . . to indicate that the shot-caller, and the gang he represented, had any interest in maiming Martinez." Not so. The evidence showed an internal gang discipline system was in effect in Dorm 336, and that both Cantu and the Mexican Mafia were interested in disciplining Martinez.

(2) *Application of rules to Cantu.*

Cantu acknowledges the evidence established he authorized a full-force regulation in order to punish Martinez for stealing, but he asserts "[t]here is literally no evidence that indicates any intention to permanently disable, disfigure, or maim Martinez. The intent was simply to administer a severe beating." Cantu argues: "[T]he *initial* attack was completely random and did *not* focus on Martinez'[s] head. Numerous inmates hit and kicked Martinez, striking every part of his body within reach. It was only *after* the initial attack subsided that Appellant Tejada 'made a calculated decision to stomp on the unconscious victim's head five to six times.' There is nothing in this record to suggest that Cantu ordered, or approved of, Tejada's 'calculated decision.' "

But there need not be proof Cantu specifically approved of Tejada stomping on Martinez's head. The evidence showed that a "full-force regulation" consisted of a no-time-limit, all-out and anything-goes type of assault. It is obvious such an assault could result in permanent disfigurement or disability, or even death. In *People v. Ferrell* (1990) 218 Cal.App.3d 828, the defendant shot the victim in the neck from two feet away. The bullet severed the victim's spine, causing partial paralysis. *Ferrell* found substantial evidence of specific intent to commit mayhem, in part because "[i]t takes no special expertise to know that a shot in the neck from close range, if not fatal, is highly likely to disable permanently." (*Id*. at p. 835.) The evidence showed Tejada's attack fell

within the permissible scope of a full-force regulation. Moreover, the evidence showed Cantu was watching Martinez's beating and that he did nothing to stop Tejada from stomping on Martinez's head. It takes no special expertise to know that multiple stomps to the head of an unconscious man lying on the floor would likely result in permanent disability or disfigurement.

Finally, Cantu argues he cannot be responsible for Tejada's conduct because Lopez testified he heard Cantu say Martinez "was going to be stabbed. He was supposed to be stabbed." Cantu asserts, "Our California Supreme Court has expressly held that evidence the victim has been stabbed numerous times is not sufficient to establish that the defendant specifically intended to maim the victim." This argument is unpersuasive.

Lopez did not testify Cantu said Martinez was supposed to have been stabbed *rather than* beaten. Cantu's remark could have meant nothing more than that he had intended Martinez to be stabbed "in addition to" being beaten. And *People v. Anderson*, *supra*, 63 Cal.2d 351, the case Cantu cites, is inapposite. There was no evidence of a planned attack in *Anderson*. Rather, the prosecution argued the defendant had tried to molest the victim and then killed her when she threatened to scream or implicate him, and the defense put on evidence that defendant had an explosive temper. Moreover, the victim in *Anderson* sustained 41 knife wounds "ranging over the entire body from the head to the extremities." (*Id.* at p. 356.) Here, the Attorney General asserts the most severe injuries were confined to Martinez's head, an assertion the defendants do not dispute.

We conclude there was sufficient evidence both defendants had the specific intent to maim Martinez.

d. *Sufficient evidence of permanent injury*.

Defendants contend their aggravated mayhem convictions must be reversed because there was insufficient evidence Martinez suffered a permanent disabling injury. This claim is meritless.

Cantu argues there was no "medical evidence that Mr. Martinez had been permanently disabled or disfigured." Tejada argues: "Apparently . . . the prosecutor contended that Martinez suffered a permanent mental disability. There was no medical evidence of any permanent mental disability. There is no evidence direct or circumstantial, except for Martinez'[s] mother's testimony, to show that Martinez suffered an ongoing and permanent mental disability as a result of the beating."

The defendants do not, however, cite any authority holding expert medical evidence is necessary in order to prove the injury element of aggravated mayhem. The only authority we have found is to the contrary. (See *People v. McWilliams* (1948) 87 Cal.App.2d 550, 551-552, disapproved on another ground in *In re Wright* (1967) 65 Cal.2d 650, 655, fn. 3 [there did not have to be expert medical evidence victim had lost sight in one eye because victim's testimony he could no longer see was sufficient].)

Here, there was some expert medical evidence. While it is true the hospital medical reports did not offer any long-term prognoses, they are not quite as useless as Tejada suggests. The hospital reports show the immediate severity of Martinez's injuries; even Tejada acknowledges the reports established Martinez had suffered significant head trauma.[3] The reports show Martinez was transferred from the emergency room to the Intensive Care Unit. And contrary to Tejada's assertion, not all the medical reports were prepared on the day of the assault; one was prepared eight days later and it indicates Martinez was still "very lethargic and . . . unable to eat or drink anything" at that time.

Tejada argues Maria's testimony was insufficient evidence of a permanent injury because it "only established that she noticed alterations in her son's speech over the telephone that may, or may not, have been attributable to the beating. Further, she

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[3] These reports show Martinez was diagnosed as having suffered "a 3-mm left parietal subdural hematoma with adjacent subarachnoid hemorrhage," and "blunt trauma to the head and back resulting in intercranial hemorrhage and transverse process fractures of left L2, L3, and L4."

admitted that his speech was returning to normal." But Tejada is forgetting Maria also testified Martinez had memory deficits regarding his childhood friends, and a problem recognizing her voice on the telephone *even when it was he who had placed the call*. From this evidence, the jury could reasonably infer Martinez's injuries, more than two years after the beating, were more than slight and temporary. In sum, the medical reports, when combined with Maria's testimony, provided substantial evidence Martinez had suffered a permanent disability as a result of the assault he suffered in Dorm 336.

Finally, Tejada argues that even if we find the evidence established all of this, it would be insufficient to convict him because it only proved Martinez had undergone "some sort of mental alteration, but there is no evidence that the assault permanently impaired him physically. Thus, there is simply no evidence of a permanent physical disability or disfigurement resulting from the assault." Tejada asserts "[t]he mayhem statute clearly contemplates a physical injury resulting in a physical impairment," and that evidence "of an altered mental state is simply irrelevant to the charge of aggravated mayhem. There is no evidence that Martinez'[s] mental state was a product of physical damage to his brain. There is no basis in the language of the statute, the case law, or the jury instructions, to conclude that a mental impairment, such as a nervous breakdown, even if it could be attributed to the assault, could elevate that assault to mayhem. . . ."

We disagree. The prosecutor did not claim Martinez had suffered an emotional breakdown, or any other kind of purely psychiatric disorder, that had somehow led to his memory problems. Rather, the prosecution claimed Martinez had suffered physical trauma to the head resulting in some kind of neurological injury which, in turn, caused his memory deficit. It is common knowledge that a nexus exists between organic brain damage and memory failure. (See, e.g., *People v. Danks* (2004) 32 Cal.4th 269, 287 [neuropsychiatrist testified people with temporal lobe abnormalities can have memory problems]; *McNall v. Summers* (1994) 25 Cal.App.4th 1300, 1310 ["Memory loss is a functional deficit generally indicating an organic injury or serious psychosis."]; *Saffro v. Elite Racing, Inc.* (2002) 98 Cal.App.4th 173, 180 [evidence in marathon runner's tort

action against race organizers, for failure to provide adequate water and electrolyte fluids, showed his "resulting neurological injuries . . . impaired his memory"].)

There was sufficient evidence Martinez had suffered a cognizable injury under the aggravated mayhem statute.

In sum, there was sufficient evidence to convict both defendants of aggravated mayhem.

2. *Improper conviction for both greater and lesser included offenses.*

Defendants contend they were improperly convicted of simple mayhem and battery with serious bodily injury because these crimes are necessarily included offenses of aggravated mayhem. The Attorney General properly concedes defendants are correct.

"In California, a single act or course of conduct by a defendant can lead to convictions 'of *any number* of the offenses charged.' [Citations.] But a judicially created exception to this rule prohibits multiple convictions based on necessarily included offenses. [Citations.] [¶] In deciding whether an offense is necessarily included in another, we apply the elements test, asking whether ' " 'all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense.' [Citation.]" ' [Citation.] In other words, 'if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' [Citation.]" (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.)

Battery with serious bodily injury (§ 243, subd. (d)) is a lesser included offense of aggravated mayhem (§ 205). (*People v. Quintero*, *supra*, 135 Cal.App.4th at 1168; see also *People v. Ausbie* (2004) 123 Cal.App.4th 855, 859, disapproved on another ground in *People v. Reed* (2006) 38 Cal.4th 1224, 1228 [battery with serious bodily injury is lesser included offense of simple mayhem].) And simple mayhem (§ 203) is a lesser included offense of aggravated mayhem. (*People v. Newby* (2008) 167 Cal.App.4th 1341, 1347-1348 ["the permanent disfiguring injury requirement is the same under [both § 203 and § 205]" and, therefore, "the [only] difference between the two sections . . . is the requisite criminal intent [in § 205], i.e., specific intent to cause the disfiguring injury"]; see also *People v. Hill* (1994) 23 Cal.App.4th 1566, 1569, fn. 2

["While aggravated mayhem (§ 205) requires specific intent to cause the disfiguring injury, simple mayhem (§ 203) is a general intent crime."].)

Hence, defendants' convictions for simple mayhem and battery with serious bodily injury must be reversed.

3. *Trial court properly denied Cantu's new trial motion.*

Cantu contends the trial court erred by denying his new trial motion based on newly discovered evidence. This claim is meritless.

a. *Legal principles.*

A defendant is entitled to a new trial on grounds of newly discovered evidence only if the evidence is newly discovered, not merely cumulative, such as to render a different result probable on retrial, and not reasonably available at trial. (*People v. Martinez* (1984) 36 Cal.3d 816, 821.) "A motion for a new trial on newly discovered evidence is looked upon with disfavor, and unless a clear abuse of discretion is shown, a denial of the motion will not be interfered with on appeal." (*People v. McDaniel* (1976) 16 Cal.3d 156, 179.)

b. *Background*.

In support of his motion for a new trial, Cantu filed a declaration from Edgar Alvarez, who stated he was one of the six inmates originally charged in the beating of Martinez. Alvarez pled guilty to assault with force likely to cause great bodily injury and was sentenced to a five-year prison term. Alvarez declared he had been living in Dorm 336 for a month and a half before the attack on Martinez. He asserted: "There was no shot-caller or dorm representative in dorm 336 from the time I was assigned through the attack on Martinez, because it wasn't necessary to have one. We looked out for one another and didn't need anyone to tell us what to do. The only time we had a dorm representative or shot-caller was when there were mixed races and the South siders needed a person to represent their interests. [¶] During the entire time I was assigned to dorm 336, I never heard Damian Cantu identify himself to anyone as the shot-caller or dorm representative, including to me. In my presence, he never held himself out to be the one in charge of the other inmates, or told anyone what to do." Alvarez also declared:

"I never saw Damian Cantu approach Criminal [Edward Garcia] or Bandit [Valentino Lopez] before the attack on Martinez. And Damian Cantu never told me or anyone in my presence to beat up Martinez. [¶] . . . No one who participated in the beating ever said that Damian Cantu had ordered them to do it."

The trial court denied Cantu's new trial motion, ruling Alvarez's evidence "would not make any different result probable on the retrial."[4]

c. *Discussion.*

Cantu argues the trial evidence showed he "was not a participant in the assault on Martinez, and the evidence that he was the shot-caller was based primarily on the testimony of Valentino Lopez, one of the inmates who assaulted [Martinez] and was testifying for the prosecution in exchange for a drastically reduced prison sentence. Had the jury heard the testimony of inmate Alvarez, directly contradicting Lopez'[s] testimony, it is at least reasonably probable that they would have failed to convict Cantu."

We disagree. Cantu is forgetting that two deputies testified he was the shot-caller in Dorm 336. Deputy Smith testified Cantu personally confirmed what she had been told in training: that he was the shot-caller for Dorm 336. She also testified how, on a daily basis, she had observed the other inmates defer to Cantu. The gang expert, Deputy Berry, testified he spoke to Cantu twice before Martinez's beating. The first time he was just making contact with Cantu, as he did with all the dorm shot-callers, in order to "make [him]self known to them and to establish a rapport with . . . each rep or shot-caller of the dorm." The second time Berry spoke to Cantu was about a week before Martinez's beating. Cantu arranged to have some gang graffiti cleaned up in the day room in exchange for Berry's moving a particular inmate into Dorm 336.

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[4] The trial court also denied the motion on the ground this evidence was not "newly discovered" because numerous other witnesses from Dorm 336 could have testified to the same facts. Given our agreement with the trial court's other rationale, we need not decide whether this was a proper reason for denying the motion.

Given this trial evidence directly contradicting Alvarez's declaration, we cannot say the trial court abused its discretion when it concluded his testimony would not have rendered a different result probable on retrial. (See *People v. McDaniel, supra,* 16 Cal.3d at p. 179 ["unless a clear abuse of discretion is shown, a denial of the [new trial] motion will not be interfered with on appeal."].)

DISPOSITION

Both defendants' convictions for simple mayhem and battery with serious bodily injury are vacated. As modified, the judgments are affirmed. The clerk of the superior court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.